ter's property; *Broadbent* v. *Ramsbotham* (Eng. 1856) 11 Ex. 602. In the exercise of his property right therein, one may lawfully retain surface water which would otherwise flow to his neighbor below; his right is one of absolute appropriation and not of user, merely, as is the case with riparian owners; *Swett* v. *Cuts* (1870) 50 N. H 439. He may also refuse to receive drainage from the land above his own and if, in repelling such flow, he damages that land, it is damnum absque injuria; *Barkley* v. *Wilcox* (1881) 86 N. Y. 140; *A. T. & S. F. R. Co.* v. *Hammer* (1879) 22 Kan. 763. So if he deflects it, before it comes upon his land, to property on either side his own, where naturally it would not flow, this too is within his right to protect his own; *Lessard* v. *Strom* (1885) 62 Wis. 112; *Parks* v. *Newburyport* (1857) 10 Gray 28. But once surface water has come upon his land, be it from whatever source, it becomes part of his soil, and it is difficult to see how he can, without committing trespass, thereafter divert it to land where it would not naturally flow. It is quite uniformly held, even in states adopting the civil law rule, that it is a trespass for one to shed the water from his roof upon the land of his neighbor; *Conner* v. *Woodfill* (189) 126 Ind. 85; *Beach* v. *Gaylord* (1890) 43 Minn. 476; *Bellows* v. *Sackett* (N. Y. 1853) 15 Barb. 96; and it should not be any the less a trespass if the flowing be caused by a ditch, a fence or a bunker, as in the principal case; *Adams* v. *Walker* (1867) 34 Conn. 466. This view is followed not only wherever the civil law rule prevails, *Rhodes* v. *Davidheiser* (1890) 133 Pa. 227, but certain of the states following in other respects the common-law rule have repudiated the dictum quoted from *Gannon* v. *Hargadon*. *Taylor* v. *Fickas* (1878) 64 Ind. 167; *Pettigrew* v. *Evansville* (1870) 25 Wis. 223; *Adams* v. *Walker*, supra. See 2 COLUMBIA LAW REVIEW 341, 504. To cast water from a roof an easement would have to be acquired, and it would seem that the right so to deal with surface water should not the less exist without the acquisition of an easement.

THE BURDEN OF PROOF IN CRIMINAL CASES WHERE INSANITY IS A DEFENSE.—The duty of the government and of the defendant where insanity is pleaded as a defense has been the subject of some difference of opinion. It is commonly understood that the duty of the government is to prove sanity in all cases, as a matter of evidence; but its burden of going forward with the proof is lightened by the presumption that sanity is the normal state of the human being. May Cr. L. § 45. In the matter of defense it has frequently been held that the defendant, if he relies on insanity, must prove it by a preponderance of the evidence, and a recent case reasserts this view; *State* v. *Clark* (Wash. 1904) 76 Pac. 98.

The duty of the government to prove sanity is well founded. It rests upon the proposition that the act done had back of it a criminal intent, and that such intent was the characteristic of a sane mind. If the mind was incapable of knowing the character of the act done, it was wanting in an element essential to make the act a crime. Hence, a state of mind capable of having a criminal intent is a vital question with the government, and for this reason

the burden of showing sanity is upon it. Aided by the presumption that sanity is the normal condition of the human mind, it establishes its case, prima facie at least, when it shows an act criminal in character, done in such a manner, and under such circumstances, as to justify the inference of criminal intention. The question then arises as to what the defendant must do to offset the prima facie case. It is certainly true that many, perhaps most courts, hold that before he can overcome that prima facie case by a defense of insanity, he must prove that insanity by a preponderance of the evidence. *Com.* v. *Eddy* (1856) 7 Gray 583; *People* v. *Hettick* (1899) 26 Col. 425; *State* v *Trout* (1888) 74 Iowa 545., May. Cr. L. § 45. It is probable that the doctrine that the law presumes every person sane had something to do with the origin and development of this rule; for the courts, looking at the presumption, may well have regarded the defense of insanity as an affirmative defense, and thus have required that it be made out by a preponderance of the evidence. On principle this seems to be erroneous; for, strictly speaking, a defendant in a criminal action never pleads affirmatively. His sole duty is to raise a reasonable doubt, not a preponderant doubt, as to his guilt. *Davis* v. *U. S.* (1895) 160 U. S., 469, 485–487; *People* v. *Riordan* (1889) 117 N. Y. 71; *State* v. *Howell* (1890) 100 Mo. 628. See also Thayer, Prelim. Treat. Ev. 384. Practically, the line of demarcation between what is a preponderance of evidence and what evidence raises a reasonable doubt is often difficult, or even impossible to find. The principal case itself suggests this, yet it prefers the rule requiring a preponderance of evidence. As appears from the authorities above, the general duty of a defendant in order to be acquitted is that he raise a reasonable doubt as to his guilt, and there appears to be no sound reason in principle at least, why he should bear a different burden because his defense is insanity. There are times, indeed, when consistency must give way before social necessity. The difficulty of determining when that necessity exists is, as a rule, very great, and its existence should not be lightly presumed when that presumption involves the disregard of a rule of law which is, on the whole, not only just, but historically and theoretically sound.